Supreme Court, U. S.
FILED
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

RICHARD L. THOMPSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004
(602) 254-7331

Counsel for Petitioner

VOLUME VI

Pages 501-604

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	)	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 MOTION TO DISMISS APPEAL Dated: January 30, 1975 Received: February 3, 1975

Appellees, James Stewart Company, M. Seth Horne, Maurine D. Horne, and Title Insurance Company of Minnesota (the Officer of the Court appointed pursuant to Order entered on October, 1973), by and through their counsel undersigned, respectfully move the Court to dismiss this appeal pursuant to Rules 4(a) and 7(d) of the Rules of the Supreme Court of Arizona on the grounds that the appeal is (1) frivolous and (2) untimely, as more fully set forth in the attached Memorandum of Points and Authorities.

The appellees further move, pursuant to Section 12-2106 of the Arizona Revised Statutes, for sanctions against the

appellant, Francis M. Cocke and Section 32-263 of the Arizona Revised Statutes for sanctions against the appellant's attorney, L. Alton Riggs, Jr., on the grounds that they did not in good faith institute this appeal as more fully set forth in the attached Memorandum of Points and Authorities.

The foregoing Motion is made on behalf of appellees, James Stewart Company, M. Seth Horne, and Maurine D. Horne, who have always been parties to this litigation. In addition, the Motion is made on behalf of the Title Insurance Company of Minnesota who, although not named in the caption of this appeal, has acted on behalf of the Court in the stead of Transamerica Title Insurance Company of Arizona in closing the escrow pursuant to the judgment of specific performance.

Respectfully submitted,

KELLY & CORBIN

/s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

TANNER, JARVIS, OWENS & HOYT

/s/ Wallace O. Tanner
Wallace O. Tanner
3800 North Central
Phoenix, Arizona 85012
Attorneys for Appellees

MEMORANDUM OF POINTS AND AUTHORITIES

UNTIMELINESS

It has been continually held that an appeal must be taken within 60 days from the filing of a formal written judgment or appealable order, and that failure to perfect the appeal within that time is jurisdictional. Harbel Oil Company v. Steele, 80 Ariz. 368, 298 P2d 798 (1956); State v. Burmingham, 96 Ariz. 100, 392 P2d 775 (1964); City of Tucson v. Wondergem, 4 Ariz. 291, 419 P2d 551 (1966); Edwards v. Young, 107 Ariz. 283, 486 P2d 181 (1971).

Even a cursory examination of the record on appeal shows that the appellant is once again attempting to relitigate issues long ago decided in both the trial court and appellate courts. The appellant attempts to do this under the guise of appealing from an order of the lower court approving the account of a court-appointed officer whose appointment was secured to insure the carrying out of a judgment of the court rendered on September 27, 1972.

The appellant previously appealed from the judgment of September 27, 1972 on January 4, 1973. By that appeal, the appellant attempted to raise the same issues which are now being raised. Upon motion of appellees, Stewart and Hornes, this Court in the former appeal held that the appeal was untimely and granted dismissal thereof. It is inconceivable that the appellant can now claim a right to appeal those same issues over two years later in this proceeding.

As to the Order Approving the Account of Court-Appointed Officer and Petition for Approval and Application for Instructions and for Distributions entered in the Superior Court on September 30, 1974, appellant has raised no substantial issues worthy of appellate review. In the Court below, the appellant's objections stemmed almost exclusively from contentions that the Title Insurance Company of Minnesota was not a duly qualified agent to act in assisting the Court in enforcing its judgment. These allegations in no way go to the merits of the account which was approved by the Court. Instead, his objections stemmed back to the judgment of September 27, 1972 and beyond.

As to any other objections which might be raised to the acts of the Title Insurance Company of Minnesota, it is clear that the proper time for raising such objections in the trial court or in an appellate court would have been following the Order granting those powers which was entered on October 31, 1973.

The appellant was fully apprised of the hearing on said Order and the entry of said Order and failed to participate in the proceeding or to take any other action in either the Superior Court or in the appellate courts concerning said Order. At this point, the appellant is well outside the 60-day period required to perfect his appeal to the merits of the appointment of the Title Insurance Company of Minnesota.

FRIVOLITY

That the appellant does not raise any new or substantial issues is clearly seen

from his filings with this Court and his Notice of Appeal filed in the Superior Court. Included in the appellant's filings is a Motion to Transfer and Use Abstract of Record. By that motion, appellant seeks to transfer the record of the previous appeal, consisting of some 13 volumes to the present proceeding. Clearly, if appellant were seeking to review some new and currently appealable order, such a task would be unnecessary.

The appellant in trying to reopen issues long ago settled argues that those past orders and judgments were conditional. Even disregarding the lack of merit of such a contention, it is obvious that this argument would have to have been raised on the previous appeal. Should the rule be otherwise, there would be no end to attempts by unsuccesssful litigants to find error in stale judgments against them.

In the case of Ferguson v. Superior Court, 59 Ariz. 314, 127 P2d 131 (1942), the Supreme Court granted a motion to dismiss an appeal on the basis that no valid appealable judgment was rendered in the trial court. The true facts were that a valid judgment had been rendered but did not show because of an error on the record. The Court found on a subsequent appeal that after the dismissal the Superior Court had no power to alter the record. The Court stated at page 133:

> "* * * The rule is, when a judgment is affirmed by this court, all questions raised by the assignments of error and all questions that might have been so raised

> are to be regarded as finally adjudicated against the appellant. * * *", and we have followed this rule consistently ever since. Sam v. State, 33 Ariz. 421, 265 P. 622; State v. Griffith, 54 Ariz. 436, 96 P2d 752.

Such is the principal of res judicata. Whether the alleged orders and judgments were conditional or not, once appellant has challenged those orders and judgments both in the trial court and on appeal, he is prevented from again challenging them on grounds that might have been raised previously.

SANCTIONS

In addition to asking that this appeal be dismissed, the aforesaid appellees are requesting that they be awarded costs and attorney's fees in accordance with Section 12-2106 of the Arizona Revised Statutes. There can be no question that this appeal is both untimely and frivolous.

Section 12-2106 provides a penalty of an amount up to ten percent of the judgment appealed from. The judgment entered on September 27, 1972, in part provided as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of

Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), said amount being for:

Consulting and Architectural Fees	- $	6,349.00
Salaries and Office Overhead	-	18,895.86
Interest on Money in Project	-	21,760.00

Therefore the appellees are entitled to up to $4,700.48 as damages for taking this appeal.

The appellant's continued filings both in the State and Federal courts at this point amount to little more than harrassment.

The Supreme Court in the case of Mosher v. Young, 50 Ariz. 389, 72 P2d 682 (1937), in awarding damages for a frivolous appeal, stated at page 683 as follows:

> * * * The record shows, from start to finish a studied effort on the part of the appellant to delay the appellee in the collection of an honest debt for money loaned appellant by appellee. * * *

The same type of studied effort has been involved in this case. The appellant has strained the appellees' efforts to achieve and enforce their judgment to unreasonable limits. Despite voluminous filings in the trial court and on appeal, the appellees steadfastly pursued their rights and finally achieved judgment. Thereafter, the appellant refused to recognize the judgment and the appellees

were subjected to numerous other legal proceedings in an attempt to insure the enforceability of their judgment.

The time and effort by appellees' counsel in these matters has far surpassed what normally should be required to obtain relief through the courts. Despite this, appellant persists in burdening the appellees and this Court with another appeal.

It is doubtful that the appellant will ever recognize the validity of the judgment against him. However, it is certainly time that the appellees receive some monetary relief for the tasks they are being put to.

This Court has seen fit to award damages under Section 12-2106 on previous occasions. Compass Realty & Investment Corp. v. A.A. Refrigeration & Heating, Inc., 21 Ariz. App. 214, 517 P2d 1107 (1974); Gangadean v. Byrne, 16 Ariz. App. 112, 491 P2d 501 (1971).

It is obvious at this point that the only claim that appellant can legitimately raise is disappointment, not legal aggrievement. As was stated in the recent case of Compass Realty, supra at page 1109:

> * * * Mere disappointment with a particular result does not constitute aggrievement sufficient to support an appeal. * * *

As to the frivolity of the appellant's objections to the account of Title Insurance Company of Minnesota, all that need be done is to look to the objections

raised in the Superior Court. None of the objections specified go to the accuracy or completeness of the account. Instead, the appellant used the date of approving the account as the springboard for raising old arguments on appeal.

The appellant has, of course, used this tactic before. On the previous appeal to this Court, the appellant appealed an order awarding of attorney's fees to appellee, Transamerica Title Insurance Company of Arizona. In the appellees' memorandum in support of its motion to dismiss, it was stated at page 2 as follows:

> * * * At the hearing, there was no objection, written or oral, as to the necessity, reasonableness or amount of attorney's fees for for that matter, to the modifications of the judgment in accordance with this Court's opinion. Likewise, there is no issue raised in this appeal as to the necessity, reasonableness or amount of attorney's fees. The sole objections to the entry of Modified Judgment are found in "F. M. Cocke's Response to Transamerica's Motion to Modify Judgment" (Ab. 895), and consist of a poorly disquised attempt to reassert and reargue before the trial court contentions that have been fully disposed of by the written opinion of this Court. * * *

This Court has previously recognized the frivolity of the issues presented by the appellant. In the previous appeal in

granting the motion to dismiss by appellee Transamerica Title Insurance Company of Arizona, this Court stated:

> It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title Insurance Company is frivolous.

The Court, however, declined at that time to impose damages under Section 12-2106. Once again, the appellees are faced with answering a frivolous appeal involving these same issues and, therefore, should be entitled to the statutory sanctions.

Throughout this litigation the appellant has been represented by the same counsel. The appellees have been forced to assume a tremendous burden in financing the defense in these continuous appeals. The good faith of the appellant's counsel in taking these repeated appeals has been questioned by the Court before in the case of Cocke v. Transamerica Title Insurance Company of Arizona, 16 Ariz. App. 556, 494 P2d 756 (1972). There it was stated as follows at page 758:

> * * * To argue at this late date that the beneficiaries of the trust still have an interest in disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court but calls into serious question the advocacy of appellant's counsel. * * *

The fact that appellant continues to refuse to recognize the validity of the multitude of judicial decisions rejecting

his claims and that appellant's counsel continues to aid the appellant in his harrassing endeavors would seem to warrant the Court to not only impose damages against the appellant, but also to elicit a reprimand of the appellant's counsel for violating his duties under Section 32-263(3) of the Arizona Revised Statutes.

In the case of Tovar v. State, 39 Ariz. 528, 8 P2d 247 (1932) the Supreme Court recognized the power to impose sanctions under this section against attorneys taking frivolous appeals on behalf of their clients. The Court, in commenting on a prevalent practice in criminal appeals, stated as follows at page 248:

> * * * If, however, the attorney does not honestly believe that there is merit in the appeal to the extent that he is willing at least to file a brief in support thereof, he is guilty of a serious violation of professional conduct, which might justify disciplinary action by this Court...* * *

This situation is in many ways analogous to an attorney who continually raises issues long ago decided in previous judicial proceedings.

On the basis of the foregoing, it is respectfully requested that this Court dismiss the current appeal, award $4,700.48 to the appellees as and for damages in connection with this appeal, and make such other orders as it deems just and proper against the appellant's attorney for his part in this appeal.

SUBMITTED this 30th day of January, 1975.

KELLY & CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

TANNER, JARVIS, OWENS & HOYT

By /s/ Wallace O. Tanner
Wallace O. Tanner
3800 North Central
Phoenix, Arizona 85012
Attorneys for Appellees

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 MARICOPA County Superior Court No. C-222472 RESPONSE TO MOTIONS TO DISMISS APPEAL AND FOR SANCTIONS OF APPELLEES STEWART-HORNE AND MINNESOTA TITLE

Filed: February 10, 1975

MEMORANDUM OF POINTS
AND AUTHORITIES

TIMELINESS

Appellant has no dispute with the cases cited in the first paragraph of Appellees' Memorandum.

However, appellees apparently have failed to take into consideration the fact that the Judgment entered September 27, 1972 (A.), was a conditional judgment, and hence not a final or appealable judgment.

As more particularly set forth below, the force and effect of the judgment, as specified on its face, must await the fulfillment of two conditions. In the next

to last paragraph of the judgment, F. M. Cocke, upon compliance by Plaintiffs (appellees Stewart-Horne) with the contract as made by the parties on October 9, 1968, is ordered to perform all obligations necessary, in accordance with such contract, to convey the subject property.

In the last paragraph of the judgment, its force and effect on the interest in and title to the property is specifically conditioned on the Plaintiffs' compliance not with the October 9, 1968 contract as made by the parties but with said contract as modified by the September 27, 1972 judgment.

Neither the Order Granting Writ Of Assistance (A.) nor the Writ itself (A.), both entered by the trial court on October 31, 1973, contained any finding or order that either of the specified conditions had been met.

On the contrary, the Order Granting Writ, at its page 4, lines 13-29 (A.), ordered Minnesota Title to effectuate the closing of the escrow and the transfer of the legal title to the plaintiffs subject to compliance by the plaintiffs with the contract and escrow instructions as modified by the September 27, 1972 judgment and as further modified by the Order.

Likewise, the Writ Of Assistance itself, at its page 2, line 16 (A.), to page 3, line 10, commanded Minnesota Title to obtain the escrow file from Transamerica and to proceed with the closing of the escrow in accordance with the contract and escrow instructions as modified by the judgment and the Order; and commanded the Sheriff, upon compliance by the plaintiffs

with the terms of the contract and escrow instructions as modified by the judgment and Order to enter upon the land, eject and remove therefrom all persons holding or detaining the land against the purchaser (the plaintiffs), and deliver possession to said purchaser or their assigns, and maintain, keep and defend their possession according to the tenor and true intent of the judgment and Order.

Accordingly, it was not until entry of the Order of September 30, 1974, that the trial court declared at page 2, lines 24-32 of such Order (A.), that the second condition, the compliance by plaintiff with the contract and escrow instructions as modified by the judgment and Order of October 31, 1973 had been met. The Order of September 30, 1974 made no finding or declaration at all that the first condition had been met.

LACK OF FRIVOLITY

Referring to appellant's contention that the judgment of September 27, 1972 was merely a conditional judgment, appellees state in their Motion:

> It is obvious that this argument would have to have been raised on the previous appeal. Should the rule be otherwise, there would be no end to attempts by unsuccessful litigants to find error in stale judgments against them.

There are two reasons why appellees' claim is without merit. First, that the judgment is conditional is perfectly clear on its face, and it is well settled that an appellate court always examines the finality,

and thus the appealability, of a judgment or order brought before it, regardless of whether it is called to their attention by the parties. Second, on September 13, 1973, F. M. Cocke in his Reply to plaintiff Buyer's Motion To Refer File called the Court's attention to the Conditional judgment Entered On September 27, 1972, and quoted the first condition, as discussed below at pages 6, 7 [ ].

SANCTIONS

In the instant case, contrary to appellees' contentions, appellant does have legal agrievement and not mere disappointment. Appellant's counsel believes that appellant's cause is just, and that the legal issues involved in this case are worthy of consideration by this Court.

For example, the judgment of September 27, 1972 at its page 8, line 14 (A.), states:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.
>
> (emphasis added)

The judgment here plainly established on its face (1) that there was only a single four-party agreement entered into on October 9, 1968, and (2) that the judgment modified or rewrote such agreement so as to extend the time for compliance by the Plaintiff Buyers from March of 1969 to

November of 1973, and so in effect to delete the cancellation provisions from the agreement.

The AGREEMENT and the Escrow Agreement No. 02013111-7 (A.) entered into by the parties on October 9, 1968, were consolidated into one four-party agreement by a provision in each. It plainly included the fine print instructions, which included the cancellation provisions. But if the judgment held that the preliminary AGREEMENT was a separate and independent contract for sale and purchase of the land, then it also held that such contract was unenforceable, because it does not mention any installments, nor does it even mention the price of the land.

Appellees appear to complain that the matters involved in this appeal are the same as the matters brought before the Court in Cocke v. Transamerica. But Appellees overlook the fact that at no time in the past have the four parties to the four-party agreement been made parties to an appeal to this Court. It has long been settled that each of the parties to a multiparty contract must be named in an action to adjudicate their mutual rights and obligations under the contract, as in this case. It has also been settled that a multiparty contract containing mutual covenants on behalf of each party, such as the escrow agreement, cannot be specifically enforced by one party thereto against only one other party thereto, since that would require rewriting the contract. 81 CJS, Specific Performance, Sections 1, 26, 158; 49 Am Jur, Specific Performance, Sections 2, 22, 157, 171. It is also well settled that where a contract states grounds upon which a party may rescind or cancel it,

the contract controls as to such grounds. 17 Am Jur 2d, Contracts, Section 495.

As long ago pointed out in Mosher v. Hiner (1945) 62 Ariz. 110, 154 P.2d 372, certiorari denied 325 U.S. 874, 65 S.Ct. 1554, 89 L.ed. 1922, any person interested in the subject matter who has a personal interest in the judgment is a "real party in interest", and unless joined in the action he cannot be bound by the judgment. Each of the four parties in interest was and is indispensable under Rule 19, 16 ARS Rules of Civil Procedure.

Appellees' Motion for sanctions would appear to be without foundation in these circumstances. The case of Tovar v. State is wholly inapplicable.

ADDITIONAL ISSUES INVOLVED IN THE PRESENT APPEAL

I. Whether the judgment entered September 27, 1972 in favor of Buyers Stewart-Horne was and is on its face only a conditional judgment, without force or effect pending judicial determination that the specified conditions have been fulfilled.

A ruling case on conditional judgments is Federal Land Bank of Louisville, Ky., v. Roney (7th Cir., 1944), 139 F.2d 175, 177, cert. den. Roney v. Federal Land Bank of Louisville, Kentucky, 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583, rehearing denied 65 S.Ct. 29, 323 U.S. 810, 89 L.Ed. 645. The court held, citing Corpus Juris:

> * * *"A judgment which will not become effective unless certain conditions are complied with, or which

> may be defeated or attended by performance of a condition subsequent, is no bar to a second action on the same subject matter unless it has become absolute by a performance of the conditions in the one case, or failure to perform in the other* * *."* * *.
>
> (emphasis added)

See also 50 C.J.S. Judgments, Section 621, Conditional Judgment, to the same effect.

The Judgment of September 27, 1972 in favor of Buyers Stewart-Horne, beginning at its page 8, line 14 (A.), states:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his

> interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the plaintiffs' compliance with the terms of said contract as modified hereby.
>
> (emphasis added)

There were two conditions plainly specified here. The first was that F. M. Cocke was ordered to perform the obligations necessary to convey the property in accordance with the escrow agreement as made by the parties upon compliance by Plaintiff Buyers with the terms of said agreement (which included the cancellation provisions).

The second condition was that should F. M. Cocke not perform as ordered, upon compliance with all necessary conditions by Plaintiffs (again including the cancellation provisions), the judgment was to divest F. M. Cocke of his interest in and title to the subject property, said title to be vested in Plaintiff Buyers, subject to the Plaintiff's compliance with the terms of the escrow agreement as modified by the judgment.

The first condition was compliance by the Buyers with the terms of the escrow agreement as made by the parties. The second condition is compliance by the Buyers with the escrow agreement as modified by the judgment. But such modification under longstanding and universal rule is not within the province or power or jurisdiction of a court, and this second condition is not subject to fulfillment at all.

The Buyers do not dispute, nor could they, that the judgment was on its face merely a conditional, not a final or effective, judgment. As a matter of fact, it was after it was admitted that the September 27, 1972 judgment was a conditional judgment that Buyers set about securing the Order of September 30, 1974, in an attempt to make the judgment effective.

Contrary to the statement made in appellees' Motions, the issue of the conditional judgment was earlier raised in the Court of Appeals, but was apparently not ruled on. The Application For Write (A. was filed by Buyers Stewart-Horne in the trial court on September 7, 1973, at which time jurisdiction remained in the Court of Appeals. On September 10, 1973 Buyers filed in the Court of Appeals their Motion To Refer File back to the trial court. On September 13, 1973 F. M. Cocke filed in the Court of Appeals his Reply to the Motion To Refer File, and on October 2, 1973 the Court denied Buyers' Motion. To avoid unnecesarey repetition, F. M. Cocke's Reply of September 13, 1973, is by this reference made a part hereof for all purposes. The attention of the Court is in particular called to Paragraph 3 on page 9 of such Reply, entitled THE CONDITIONAL JUDGMENT ENTERED ON SEPTEMBER 27, 1972.

Copies of Buyers' Application For Writ, with all of its exhibits, and of the trial court's Order To Show Cause addressed to Transamerica (despite the fact that it was never joined in Buyers' action for specific performance of the escrow agreement as made by the parties) were attached to F. M. Cocke's Reply of September 13, 1973, and were thus also placed before the Court of Appeals at that time.

II. A second issue not yet ruled on is whether the Writ Of Assistance issued by the trial court on October 31, 1973 and directed to Minnesota Title and to the Sheriff of Maricopa County to enforce the escrow agreement "as modified", was void because issued without a final and effective judgment to support it, as well as because based on a trial court hearing held when jurisdiction of the case was still in the appellate court.

The Writ Of Assistance (A.) incorporated as exhibits attached thereto the Judgment of September 27, 1972, and the Order Granting Writ entered October 31, 1973. Minnesota Title as a court-appointed corporate officer of the court purportedly acted as directed by this three-document process, without regard to Article 7, Section 15, of the Arizona Constitution which specifies that every person appointed to any office of trust or profit under the authority of the state shall be a qualified elector.

The Sheriff, however, after noting the condition precedent to any positive action repeatedly set forth in the process (the compliance by the Buyers with the agreement as modified by the Judgment or the Order or both) refused to take possession of the land from F. M. Cocke. The process plainly did not meet the requirement of ARS Section 11-447. This statute specifies that a sheriff or other ministerial officer is justified in the execution of and shall execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued. The controlling decision noted under 11-447, Schuster v. Merrill

(1940) 56 Ariz. 114, 106 P.2d 192, held that:

> * * *and process was "regular on its face" when it proceeded from a court, officer, or body having authority of law to issue process of that nature, and which was legal in form and contained nothing to notify or fairly apprise any one that it was issued without authority.
>
> (emphasis added)

The process stated repeatedly that a contract was being modified by a court. The universal rule as to such modification was succintly stated in Goodman v. Newzona (1967) 101 Ariz. 470, 421 P.2d 318:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.* * *
>
> It is the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh.

As pointed out in 33 CJS, Executions, Sections 5, 6, 15, at page 136:

> Except as it may be otherwise provided by statute, an execution cannot be lawfully issued on other than a final judgment or decree pronounced by a competent court which has determined the respective rights and liabilities of the parties litigant, and an execution issued without a judgment or decree to support it is void and confers no authority on the officer to whom it is directed.* * * A judgment rendered after the issuance of the execution will not have a retrospective effect so as to validate the execution. * * *

At page 137:

> * * *where two or more plaintiffs in separate actions obtain separate judgments against the same defendant, an execution should not be issued as if on a joint judgment, but an execution should be issued on each judgment; * * *
>
> * * *an execution cannot issue on a decree which leaves with the clerk for settlement a question not within his jurisdiction. * * *

At page 138:

> It is essential that the judgment, to be a sufficient basis for a valid execution, be not a mere interlocutory order, or dependent on a mere contingency, but it must be a final determination of the contention between the parties; and must dispose of all the parties; * * *

At page 150:

> Since the execution must pursue and conform to the judgment, it follows that it* * *cannot be issued against one not a party even though he is interested in the judgment, or in fact the real party in interest in the suit. * * *

Transamerica, never joined in Buyers' suit for specific performance of the contract and escrow instructions, could not be bound by the judgment of September 27, 1972 in favor of Buyers. Minnesota Title, substituted by the Order Granting Writ (A.) for Transamerica with all of Transamerica's rights, privileges and duties, could likewise not be bound by the judgment, and could therefore not be bound by the three-document process.

III. Other issues not yet ruled on are (1) whether the trial court's Order of September 30, 1974, ruled that Buyers Stewart-Horne had ever complied with the escrow agreement as made by the parties; (2) whether the trial court had jurisdiction to rule in such Order that Buyers had complied the agreement "as modified" by the trial court; (3) whether such Order of September 30, 1974, cured the conditional judgment of September 27, 1972, and (4) whether such Order validated the Order Granting Writ and the Writ under which Minnesota Title purportedly acted but under which the Sheriff refused to take possession of the land from F. M. Cocke.

It is a well-settled principle that a judgment which specifically conditions its force and effect on the performance or non-performance of certain acts to be done in the future by the parties, as did the judgment of September 27, 1972, remains without

force or effect unless and until the conditions are fulfilled. See Words and Phrases, "Conditional Judgment". This was recognized in the Arizona case Reed v. Frey (1969) 10 Ariz. App. 292, 458 P.2d 386, in which the court pointed out that the doctrine of res judicata applied only to final judgments (not conditional judgments). In Burney v. Lee (1941) 57 Ariz. 41, 110 P.2d 554, the court followed the long-standing rule that a writ of assistance issues only where the ownership or right to possession has been fully determined, as by a final, not a conditional judgment or decree.

Where, as in this instant case, a writ of assistance was issued without final and effective judgment to support it, the question of the validity of the writ was examined and decided in Jackson v. Sears, Roebuck & Co. (1957) 83 Ariz. 20, 315 P.2d 871. In that case the court held that an execution issued without a judgment to support it is void, and no authority is conferred upon the officer to whom such execution is delivered, and that even if a valid and effective judgment is subsequently obtained, it will not have a retroactive effect so as to validate the execution. See also 33 CJA, Executions, quoted hereinabove at page 10 [ ].

Thus, the Order Granting Writ and the Writ under which Minnesota Title purportedly acted were not validated by the Order of September 30, 1974, and were and are void, under the principles pointed to in Jackson v. Sears as well as because of the modification of the agreement.

IV. Whether the trial court had jurisdiction over the subject matter in

entering the three separate judgments against F. M. Cocke and in favor of each of the three other principal parties to the four-party escrow agreement, and whether such judgments were and are therefore void.

Each of these three judgments granted, as sought, the relief of alteration of the agreement. Each of such judgments was entered in the absence of the other two parties, indispensable in a proper determination of their mutual rights and obligations under the single agreement entered into. And each of such judgments was entered without findings to support such judgment as required by due process of law, and therefore was entered without power and authority in the court.

In Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, cert. den. (1972) 406 U.S. 945, 32 L.Ed.2d 332, the court said at 156:

> The Supreme Court long ago established the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter:
>
> Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to enforce such judgment or decree. (Citations omitted.)

In Terrell v. Allison, 21 Wall. 289, 22 L.ed 634, the court pointed to the rule that a writ of assistance can only issue

against parties whose rights have been determined in the proceedings, and persons entering into possession under them after suit commenced, pendente lite, and are thus bound by the decree. See also Mosher v. Hiner, supra page 5 [ ].

As restated in the words of Rule 12(b), it is clear that if a court is without the power or jurisdiction to grant the relief sought, it is without jurisdiction over the subject matter. Failure to join a party indispensable under Rule 19 would have the same effect. Rules 12(b)6, 1 & 7; 12(i)2 & 3; 16 ARS Rules of Civil Procedure.

V. Whether the doctrine of res judicata applies only to valid and final judgments, not void or conditional judgments.

In Earle v. McVeigh (1876) 91 U.S. 503, 23 L.ed 398, the court said at U.S. 507:

> * * *Standard authorities lay down the rule, that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose. Borden v. Fitch, 15 Johns. 141.
>
> (emphasis added)

In Reed v. Frey (1969) 10 Ariz. App. 292, 458 P.2d 386, the court pointed out that

the doctrine of res judicata applies only to final judgments (not conditional judgments).

In Brecht v. Hammons (1929) 35 Ariz. 383, 278 P. 381, 382, the court said:

> Three things must concur or a judgment is void upon its face, and may be attacked at any time. The court must have (a) jurisdiction of the subject-matter of the case, (b) jurisdiction of the persons involved in the litigation, and (c) jurisdiction to render the particular judgment given.

Words and Phrase, "Void Judgment", includes:

> A "void judgment" is one which shows on face of record the want of jurisdiction in court assuming to render judgment, which want of jurisdiction may be either of the person, or of the subject matter generally, or of the particular question attempted to be decided or relief assumed to be given. * * *
>
> A "void judgment" is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as tresspassers.* * *

In Preston v. Denkins (1963) 94 Ariz.

214, 382 P.2d 686, the Arizona Supreme Court, En Banc, held that:

> The right to challenge a judgment on the ground that it is void for lack of jurisdiction of the parties does not depend upon rules of court or statute.
>
> Court has no discretion to refuse to vacate a judgment void for lack of jurisdiction and must vacate such a judgment.
>
> Order setting aside entire judgment as void does not leave judgment valid as against defendants not properly before court on the motion to vacate.
>
> Brandt v. Brandt (1953) 76 Ariz. 154, 261 P.2d 978, held that the statute of limitation does not bar an attack upon a void judgment, but that it may be attacked anywhere and at any time.

Accordingly, the Motion To Dismiss and for Sanctions should be denied.

Respectfully submitted this 10th day of February, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	NO. 1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation. Appellee.	MOTION TO DISMISS APPEAL AND IMPOSE SANCTIONS Dated: February 13, 1975 Received: February 21, 1975

Appellee, Transamerica Title Insurance Company of Arizona, by and through its undersigned counsel, respectfully moves this court to dismiss the appeal pursuant to Rules 4(a) and 7(d), Rules of the Supreme Court of Arizona, on the grounds that the appeal is on its face, untimely and frivolent in substance as well as form.

Appellee, Transamerica Title Insurance Company of Arizona, further moves pursuant to Section 12-2106 A.R.S. for sanctions against the appellant, Francis M. Cocke, and pursuant to Section 32-263 A.R.S., for sanction against appellant's attorney, L. Alton Riggs, Jr., on the grounds that the appeal was not instituted in good faith, is patently untimely, and frivolous.

This Motion is supported by the attached Memorandum Of Points And Authorities, Certificate of the Clerk of the Superior Court, attached to the Motion To Dismiss filed by James Stewart Co., which certificate is incorporated herein by reference.

DATED this 13th day of February, 1975.

BROWDER & GILLENWATER, P.C.

By /s/ Powell B. Gillenwater
Powell B. Gillenwater

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant seeks to appeal from various judgments entered herein beginning November 10, 1970, through September 30, 1974. The only judgments that involve appellee, Transamerica Title Insurance Company of Arizona, are those itemized in paragraph six of the Notice Of Appeal as follows:

> "6. The Summary Judgments in favor of counter-defendant, Transamerica Title Insurance Company, and against counter-claimant, Francis M. Cocke, entered November 10, 1970, and the Order Modifying said Judgment of November 10, 1970, and Judgment upon Supersedeas and Cost Bonds, entered November 6, 1972."

The Notice Of Appeal was filed herein on November 27, 1974, almost four years after the original judgment and two years after the order modifying the original judgments. Not only is the attempted appeal, as to Transamerica Title Insurance Company, glaringly untimely, it is in fact, the second appeal by appellant from the Judgments set forth above. The Judgment of November 10, 1970, was appealed by Mr. Cocke and affirmed by the Court of Appeals, in Cocke v. Transamerica Title Insurance of Arizona, (1972) (16 Ariz. App. 566, 494 P.2d 756).

The Order modifying the Judgment of November 10, 1970, which was entered on November 6, 1972, was likewise appealed by Mr. Cocke and dismissed by this court as a frivolous appeal on October 2, 1973, the court stating:

> "It is the opinion of the court that the appeal from the Judgment in favor of Transamerica Title Insurance Company is frivolous."

A copy of the court's order as to that appeal is attached hereto and incorporated herein by reference.

One can only conclude that this appeal is not only frivolous, but constitutes continued harassment by the appellant. This court, on the previous appeal, refused to impose sanctions, although it held the appeal to be frivolous and the court is now, once again, burdened with the same frivolous and patently untimely appeal. It is respectfully suggested that the time has come for the imposition of sanctions, not only as to the appellant, but as to appellant's counsel, who has been forewarned that the reargument of final judgments that have been affirmed on appeal, is questionable advocacy. In Cocke v. Transamerica Title Insurance Company of Arizona, 16 Ariz. App. 566, 494 P.2d 756 (1972), the court stated:

> "To argue at this late date that the beneficiaries of the trust still have an interest in disposition of this real property, and therefore are indispensable parties, not only taxes the patience of this court but calls into serious question the advocacy of appellant's counsel."

The same appellant and counsel are now before this court attempting once again to relitigate and reargue the case of Cocke v. Transamerica, supra, coupled with a second attempt to appeal from the judgment entered November 6, 1972, knowing that their first appeal of that judgment has already been determined by this court to be frivolous.

It would unduly lengthen this memorandum to recite to the court the various legal proceedings that Transamerica has been forced to defend, all springing from

the original counter-claim of Mr. Cocke against Transamerica, which was found to groundless in Cocke v. Transamerica, supra. The continuous harassment of Transamerica, both in the state courts and in the Federal courts, is an onerous burden that should not go uncompensated. For the foregoing reasons, it is requested that the court not only dismiss the untimely and frivolous appeal as to Transamerica Title, but that the court enter an Order granting damages in such amount as the court deems appropriate as sanctions against the appellant and appellant's counsel who choose to ignor the lawful order of this court.

Respectfully submitted this 13th day of February, 1975.

BROWDER & GILLENWATER, P.C.

By /s/ Powell B. Gillenwater
Powell B. Gillenwater

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C-222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	O-R-D-E-R Filed: October 2, 1973

The motion to dismiss appeal filed by appellee Transamerica Title Insurance Company, its request for assessment of attorney's fees and costs on appeal and the response thereto have been considered by Judges Donofrio, Ogg and Stevens. In addition, the "motion to refer file pertaining to James Stewart, an Arizona corporation, M. Seth Horne and Maurine D.

Horne, his wife, back to Maricopa County Superior Court" and the reply thereto have also been considered. It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title is frivolous.

IT IS ORDERED granting Transamerica Title Insurance Company of Arizona's motion, and the appeal is hereby dismissed.

IT IS FURTHER ORDERED that it is the opinion of the Court that the appeal is frivolous. Nevertheless, the Court declines to impose sanctions authorized by A.R.S. §12-2106.

IT IS FURTHER ORDERED denying the motion of Stewart and Horne to refer portions of the file back to the Maricopa County Superior Court.

/s/ Francis J. Donofrio
FRANCIS M. DONOFRIO,
Presiding Judge, Department A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant. vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 CERTIFICATE OF THE CLERK OF THE SUPERIOR COURT

I hereby certify that:

1. The amount or character and date of rendition of the Judgments and Orders appealed from are as follows:

a. The Order Approving Account of Court-Appointed Officer and Petition for Approval and Application for Instructions and for Distributions, entered on September 30, 1974;

b. The Writ of Assistance or, Alternatively, Order Requiring Compliance with Judgment Dated September 27, 1972, or Supplemental Bill Enforcing Said Judgment, entered on October 31, 1973;

c. The Order Granting Application for Writ of Assistance, or,

Alternatively, Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing Said Judgment, entered on October 31, 1973;

d. The Second Amended Judgment for Specific Performance and in the amount of $47,004.86 in addition to Specific Performance, entered on September 27, 1972;

e. The Judgment in Favor of Cross-Claimant Francis M. Cocke, entered on November 10, 1970;

f. The Summary Judgment in Favor of Counter-Defendant Transamerica Title Insurance Company and Against Counter-Claimant Francis M. Cocke, entered on November 10, 1970, and the Order Modifying Said Judgment of November 10, 1970, and Judgment on Supersedeas and Cost Bonds, entered on November 6, 1972.

g. Each and every Order merged in any of the above Orders and Judgments with various dates of entry.

2. The Notice of Appeal was filed with the Clerk of the Superior Court on the 27th day of November, 1974, and service thereof appears on said Notice by mailing on the 27th day of November, 1974.

3. A Bond for Cost on Appeal was filed in the amount of $250 on the 27th day of November, 1974.

4. The Bond in the form of a cashier's check was proper.

5. The record in this matter was completed on the 7th day of January, 1975.

6. The names of the attorneys for the respective parties are as follows:

L. Alton Riggs, Jr.
Attorney for Appellant,
Francis M. Cocke

Powell B. Gillenwater
Browder & Gillenwater, P.C.
Attorneys for Appellee,
Transamerica Title Insurance
Company of Arizona

Loretta S. Whitney
Attorney for Appellee,
Joan H. Cocke

George Sorenson, Jr.
Attorney for Dorthy Cocke
Haimovitz and Elizabeth Cocke
Francis

Hubert E. Kelly
Kelly & Corbin, P.C.
Attorneys for Appellees,
James Stewart Co.,
M. Seth Horne,
Maurine D. Horne, and
Title Insurance Company
of Minnesota

Wallace O. Tanner
Tanner, Jarvis, Owens & Hoyt
Attorneys for Appellees,
James Stewart Co.,
M. Seth Horne,
Maurine D. Horne, and
Title Insurance Company
of Minnesota

GIVEN under my hand and the seal of the Superior Court of the State of Arizona in and for the said County this 30th

day of January, 1975.

/s/ Wilson D. Palmer
Clerk of the Court

By /s/ Lupita Alcala
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 ORDER Filed: February 24, 1975

The separate motions of appellees James Stewart Co., M. Seth Horne, and Maurine D. Horne, and of appellee Transamerica Title Insurance Co. of Arizona, to dismiss the appeal, for damages for taking a frivolous appeal, and for sanctions against appellant's attorney were considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating. Appellant's untimely response to the Stewart and Horne motion was also considered. No response has been filed to the Transamerica motion.

The motions to dismiss are based on lack of jurisdiction and frivolousness. The Court has before it at this time the complete record on appeal and the motion papers, which as noted are based in part

on the claimed frivolous nature of this appeal. The Court presumes that faced with such a motion, appellant would assert or enumerate all issues which he intends to raise on appeal, in order to demonstrate that his appeal is meritorious rather than frivolous. Furthermore, to be in issue on appeal, an issue would generally have had to be raised in the trial court. Appellant has listed in his late response a number of issues he asserts should be considered on appeal. In view of the nature of these issues, the posture of this case, and the past disposition of such issues, the Court finds that they are either precluded from consideration or frivolous. After reviewing the entire record herein, and particularly the notice of appeal, appellant's response in the trial court to the petition leading to the order of September 30, 1974, that order itself, and the present motion papers, the Court is forced to conclude that there are no issues of any substance raised by the present appeal, and that the present appeal was taken solely for delay, with no sufficient grounds, and is completely frivolous.

The notice of appeal herein recites that the appeal is from eight separate, specified orders or judgments, and from "Each and every order merged in any of the above orders and judgments." This last designation is merely surplusage, as any order merged in an appealed order or judgment would not be separately appealable and would automatically be considered on appeal from the final order or judgment itself.

Of the eight orders and judgments specified as being appealed from, seven have long since become final and are no

longer subject to appeal either because they were final and appealable when entered, and no appeal was timely perfected therefrom (Notice of Appeal items two, three, and five); or because they were previously appealed and either affirmed or the appeals dismissed (Notice of Appeal items four and six). All of these orders and judgments are already final, res judicata, and not subject to the subsequent, collateral attack appellant is attempting here. The attempted appeal from items two through seven therefore confers no jurisdiction on this Court, as all of such matters are patently non-appealable, and knowledge thereof must be imputed to both appellant and his counsel. The Court therefore regards the purported appeal therefrom as taken solely for delay and frivolous and an abuse of the appellate process.

With respect to the order of September 30, 1974 (Notice of Appeal item one), the only issues raised or specified by appellant are either frivolous on their face or relate to the validity of previous orders and judgments, all of which have become final. No issue whatsoever was raised concerning the account itself, the distribution to be made, or any other aspect of the petition, or the resulting order, except for the authority of the substitute escrow agent to act as such, which should have been questioned when it was first appointed as such in October 1973.

Considering the entire history of this case as revealed by the procedure involved in the orders purportedly appealed from herein, the Court is presented with an extensive set of blueprints for studied

delay and harassment of a party's opponents and a stretching, if not an abuse, of the limits of the judicial process, rather than a legitimate attempt to resolve honestly and expeditiously a bona fide dispute. Repeated filings of excessively long motions and memoranda, amendments and supplements thereto, appeals taken repeatedly on almost the last permissible day therefor, and repetitious raising of previously resolved issues or frivolous issues (such as the ineligibility of the substitute corporate escrow agent to serve as such because it was not an "elector") indicate a consistent plan by appellant to delay and harass his opponents and to burden the Courts of this State with protracted and frivolous litigation; and this appeal is but the latest stage in the execution of such plan. Appellant has already been treated very leniently by the Courts, and has escaped the imposition of damages upon the dismissal of one of his previous appeals as frivolous, which very case he now seeks to appeal again. On the basis of all of the foregoing, we do not hesitate to label this appeal frivolous and to take appropriate action to terminate it to the extent that is within the jurisdiction of this Court.

One of the judgments appealed from awarded appellees James Stewart Co. and the Hornes the sum of $47,004.86. One of the orders appealed from awarded appellee Transamerica Title Insurance Co. of Arizona the sum of $10,533.

IT IS ORDERED granting all appellees' motions to dismiss, and dismissing this appeal for lack of jurisdiction as to matters two through six designated as appealed from in the notice of appeal,

and dismissing this appeal on its entirety as frivolous.

IT IS FURTHER ORDERED granting the motion of appellees James Stewart Co., M. Seth Horne, and Maurine D. Horne for damages, and awarding appellees James Stewart Co., M. Seth Horne and Maurine D. Horne the sum of $4,700 for damages for appellant's taking a frivolous appeal, and ordering that said appellees have and recover said sum from appellant, Francis M. Cocke.

IT IS FURTHER ORDERED granting the motion of appellee Transamerica Title Insurance Co. of Arizona for damages, and awarding appellee Transamerica Title Insurance Co. of Arizona the sum of $1,053 as damages for appellant's taking a frivolous appeal, and ordering that said appellee have and recover said sum from appellant, Francis M. Cocke.

IT IS FURTHER ORDERED denying all appellees' motions for disciplinary sanctions against appellant's attorney, as not within the jurisdiction of this Court.

DATED this 24th day of February, 1975.

/s/ William E. Eubank
William E. Eubank
Acting Presiding Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 MARICOPA County Superior Court No. C-222472 RESPONSE TO MOTION TO DISMISS APPEAL AND FOR SANCTIONS OF APPELLEE TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA

Filed: February 25, 1975

Appellant Francis M. Cocke by and through his counsel undersigned respectfully moves the Court to deny the Motion To Dismiss Appeal and For Sanctions of Appellee Transamerica Title Insurance Company of Arizona, received February 21, 1975, on the grounds that the appeal is not untimely or frivolous and that appellant F. M. Cocke and Appellant's attorney L. Alton Riggs, Jr., have instituted this appeal in good faith and upon good grounds, all as more fully set forth in the attached Memorandum Of Points and Authorities.

Respectfully submitted this
25th day of February, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By_____
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

MEMORANDUM OF POINTS AND AUTHORITIES

Attached hereto and made a part hereof for all purposes is a copy of the Memorandum Of Points and Authorities attached to Appellant's Response, filed herein February 10, 1975, to the Motion To Dismiss And For Sanctions of appellees Stewart-Horne and Title Insurance Company of Minnesota.

In addition, appellant calls attention to the simple fact that the summary judgment entered November 10, 1970, in Transamerica's favor was and is void on the face of the record, and therefore void on its face. Brecht v. Hammons (1929) 35 Ariz. 383, 278 P. 381. Such judgment plainly rested on the asserted power of the Court to enforce paragraphs 8, 9 and 10 of the fine print instructions and at the same time to modify, or alter or delete, paragraphs 1, 14, 16, 17, 18, 24, 25 and 43 of the same fine print instructions. The relief assumed to be given was alteration of the escrow agreement. This has no precedent, in controlling cases, in law or equity. Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P2d 318.

Accordingly, the Motion To Dismiss And For Sanctions should be denied.

Respectfully submitted this 25th day of February, 1975.

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

(A copy of the Response to Motion to Dismiss Appeal of Stewart-Horne and Minnesota Title was attached to the foregoing as a part thereof.)

COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, APPELLANT, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, APPELLEES.	1 CA-CIV 2970 Department B MARICOPA COUNTY No. C-222472

Filed: March 10, 1975.

APPELLANT'S OPENING BRIEF

* * * * *

This fundamental right to have the presented facts examined and ruled on was long ago guaranteed by the federal constitution and laws. In Baltimore & Ohio R. Co. v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S.Ct. 797 (1936), the court said at L.ed 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function

> involved. That includes the right to introduce evidence and have judicial findings based upon it.

See also United States v. Aluminum Company of America (1941) 2 FRD 224, 231, and cases cited.

As to the federally guaranteed and protected right to the enforcement of the contract and escrow instructions as made by the parties, in the Arizona case Truax v. Corrigan, 257 U.S. 312, 66 L.ed 254, 42 S.Ct. 124, quoting and following Barbier v. Connelly, 113 U.S. 27, 28 L.ed 923, 5 S.Ct. 357, the court said at L.ed 264:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended,* * *that all persons* * * should have like access to the courts of the country for the protection of their persons and property,* * *the prevention and redress of wrongs and the enforcement of contracts;* * *
>
> * * * * *

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 Department B MARICOPA County Superior Court No. C-222472 APPELLANT'S MOTION FOR RE-HEARING ON ORDER ENTERED FEBRUARY 24, 1975 DISMISSING APPEAL AND IMPOSING SANCTIONS

Filed: March 11, 1975

Comes now appellant Francis M. Cocke by counsel undersigned and moves for a re-hearing on this Court's Order of February 24, 1975. The Order granted the motion of appellees James Stewart Company and M. Seth and Maurine D. Horne, and of Title Insurance Company of Minnesota as an officer of the superior court, and also granted the later motion of appellee Transamerica Title Insurance Company of Arizona, to dismiss the appeal and to impose sanctions on the ground that the appeal was completely frivolous.

The appeal was dismissed and the sanctions imposed before appellant's opening brief was filed, the date of the order of

dismissal being two weeks prior to the end of the time allowed for filing of the brief. The opening brief has now been prepared and filed, and the Court has been so provided with perhaps a better and more complete view of appellant's position in this case than was presented by the responses to the two motions to dismiss and for sanctions.

Counsel for appellant is fully aware that this Court feels strongly that the matters involved in this appeal are res judicata. As set forth in the attached memorandum it is appellant's position that the various judgments and orders appealed from were either conditional and therefore not final, or not within the jurisdiction of the Court.

Respectfully submitted this 11th day of March, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

MEMORANDUM OF ISSUES RAISED

At the outset the Court stated in its order of February 24, 1975, that it had considered appellant's untimely response to the Stewart and Horne motion to dismiss and that no response had been filed to the Transamerica motion.

Counsel for Appellant received the Stewart and Horne motion on Monday, February 3, 1975, and filed the response on Monday, February 10, 1975. During this period of time counsel was home sick with influenza from Monday, February 3, 1975, through Thursday, February 7, 1975, but did not request additional time to respond as it was counsel's understanding that a Monday, February 10, 1975, filing would be timely.

The Transamerica motion was mailed to appellant's counsel on February 14, 1975, according to the date on the envelope. However, the correspondence was improperly addressed and did not reach counsel's law office until February 21, 1975. Appellant's response was filed with the Court on February 25, 1975. The Court ruled on February 24, 1975, prior to the filing of the response to Transamerica's motion. This response incorporated the earlier response to appellee Buyers' motion and added the issue of the validity of Transamerica's separate summary judgment.

Appellant's two responses appear to have called the attention of the Court to the basic issues, raised by the claims of res judicata, of the power and jurisdiction of a court to (1) fundamentally modify or alter a valid agreement, (2)

to enter judgment without any findings or conclusions at all on undisputed facts and evidence presented, from which the inferences or conclusions could be reasonably, if not inescapably, drawn that the agreement was repudiated or cancelled under its own terms, before the litigation over it began. Also pointed to was (3) the issue of whether a court had jurisdiction to bind by judgment a party in interest where not joined in the action and (4) the issue of the conditional judgment.

The notice of appeal included timely appeal from the Order entered September 30, 1974. This Order on its face expressly ruled that Buyers' judgment entered September 27, 1972 had modified the agreement of the parties entered into on October 9, 1968, and also ruled that the escrow had been closed in accordance with such agreement as so "modified".

That such modifications included fundamental alterations is also clear. The September 27, 1972 judgment expressly "modified" the agreement of the parties by adding four years and eight months to the 13-day period specified by the agreement for compliance by the Buyers, following the escrow agent's March 6, 1969 notice to them that to avoid cancellation they must comply by March 19, 1969.

Buyers' judgment of September 27, 1972 also plainly ruled that the "contract" entered into on October 9, 1968 constituted a single four-party agreement, which included the provisions for the annual installments on the mortgages, and also included the fine print

instructions on the back of Transamerica's printed escrow form, which contained the cancellation provisions. If the judgment had ruled that the preliminary Agreement entered into on October 9, 1968 was a separate and independent contract, instead of a part of the single four-party agreement, it would have so ruled that it was unenforceable, because it contained no provisions for installments, and did not even mention the price of the land.

Buyers' judgment entered September 27, 1972 on its face in its last paragraph also specifically subjected or conditioned its force and effect on the compliance by the Buyers with the agreement as modified by the judgment. This was done even though in its next to last paragraph the judgment ordered F. M. Cocke to perform all obligations necessary to convey the subject property, upon compliance by the Buyers with the agreement as made by the parties (not as modified).

The obvious issue of whether the Order entered September 30, 1974 ruled that Buyers' judgment of September 27, 1972 was void for want of jurisdiction to modify the agreement, is Question I of the questions presented for review by the opening brief. Whether the September 27, 1972 judgment ruled that only the single four-party agreement was entered into on October 9, 1968, whether such agreement contained the cancellation provisions, whether the judgment fundamentally altered the cancellation provisions, and was a conditional judgment, is Question II of the opening brief.

Each of these issues was pointed to

by appellant's first response, which on its page 6 quoted the last three paragraphs of the September 27, 1972 judgment to prove the points made. The issue of the conditional judgment was discussed at length, and included the issue of whether the point was earlier raised. A controlling case which ruled that a court is without jurisdiction to modify a valid agreement, Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318, is a case almost on all fours with this present case, and was quoted in the response.

ISSUES POINTED TO BY THE RESPONSES

The Order dismissing the appeal stated that appellant was expected to list in the responses the issues to be raised by the appeal. However, appellant's first response, beginning at its page 5, lines 4 and 16, stated:

> * * *But Appellees overlook the fact that at no time in the past have the four parties to the four-party agreement been made parties to an appeal to this Court.* * *
>
> It is also well settled that where a contract states grounds upon which a party may rescind or cancel it, the contract controlls as to such grounds.* * *

At page 5, line 32, under the heading Additional Issues Involved In The Present Appeal, the response listed as I the issue of the conditional judgment, and at page 8, line 23, as II the issue of whether

the Writ Of Assistance was void because issued without a final and effective judgment to support it, as well as because based on a hearing in superior court held when jurisdiction of the case was still in the appellate court. Beginning at its page 11, line 1, the response stated:

> III. Other issues not yet ruled on are (1) whether the trial court's Order of September 30, 1974, ruled that Buyers Stewart-Horne had ever complied with the escrow agreement as made by the parties; (2) whether the trial court had jurisdiction to rule in such Order that Buyers had complied with the agreement "as modified" by the trial court; (3) whether such Order of September 30, 1974, cured the conditional judgment of September 27, 1972, and (4) whether such Order validated the Order Granting Writ and the Writ under which Minnesota Title purportedly acted but under which the Sheriff refused to take possession of the land from F. M. Cocke.

Beginning at its page 12, line 10, the response pointed to another jurisdictional question:

> IV. Whether the trial court had jurisdiction over the subject matter in entering the three separate judgments against F. M. COCKE and in favor of each of the three other principal parties to the four-party escrow agreement, and whether such judgments were and are therefore void.

> Each of these three judgments, granted as sought, the relief of alteration of the agreement. Each of such judgments was entered in the absence of the other two parties, indispensable in a proper determination of their mutual rights and obligations under the single agreement entered into. And each of such judgments was entered without findings to support such judgment as required by due process of law, and therefore was entered without power and authority in the court.

And on its page 13, line 13, pointed to the issue of res judicata:

> V. Whether the doctrine of res judicata applies only to valid and final judgments, not void or conditional judgments.

ISSUES AND QUESTIONS
PRESENTED BY THE BRIEF

The issues and questions presented by the opening brief in addition to I and II mentioned above are:

III, the issue of the validity of the summary judgment entered November 10, 1970 in favor of Transamerica (because it altered the agreement).

IV Whether Transamerica's summary judgment entered November 10, 1970, and the summary judgment granted the Buyers by minute order on December 8, 1970 were properly granted, because the facts presented did not as a matter of law lead to only one conclusion, and F. M. Cocke was

entitled to have the matter tried.

V Whether the Writ Of Assistance under which Minnesota Title purportedly closed the escrow was void, and whether deeds executed or delivered by it vested no title in the grantee; and

VI Whether the Buyers' complaint for specific performance of the agreement failed to state a claim upon which relief could be granted.

As noted by Supreme Court Rule 5(b)7, the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. And it is therefore appellant's position that the responses sufficiently listed the issues to be raised on the appeal.

RIGHTS SECURED AND PROTECTED BY THE FEDERAL CONSTITUTION AND LAWS

To establish that the right to findings and conclusions on facts and evidence presented, and as well as the right to enforcement of the contract as made by the parties, are rights secured and protected by the federal constitution and laws, the opening brief at page 43 quotes Baltimore & Ohio R. Co. v. United States, 298 U.S. 349, 80 L.Ed. 1209, 56 S.Ct. 797:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

And at page 44 quotes the Arizona case Truax v. Corrigan, 257 U.S. 312, 66 L.Ed. 254, 42 S.Ct. 124:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, * * *that all persons* * *should have like access to the courts of the country for the protection of their persons and property,* * * the prevention and redress of wrongs and the enforcement of contracts;* * *

This constitutional right as a matter of due process to findings and conclusions on facts and evidence presented is the fundamental principle adhered to in Lundy v. Prescott Valley, Inc. (1974) 110 Ariz. 362, 519 P.2d 61, which is quoted at page 40 of the brief:

> * * *The facts presented do not as a matter of law lead to only one conclusion; on the contrary the facts are subject to interpretation which allow for reasonable men to reach different conclusions. Under such circumstances the plaintiff was entitled to have the matter tried and the defendant was not entitled to judgment.
>
> The judgment is reversed, and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

To the same effect are Realty Executives, Inc. v. Willis (1973) 20 Ariz. App. 340, 512 P.2d 872; and Dutch Inns of America, Inc. v. Horizon Corporation (1972) 18 Ariz. App. 116, 500 P.2d 901.

Likewise, the constitutional right to enforcement of the October 9, 1968 agreement as made by the parties is the fundamental principle adhered to in the Goodman v. Newzona Investment Co. case, mentioned above. In that case, which is quoted at page 20 of the brief, the court said:

> * * *It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.
> * * *
>
> (Citations omitted)

In Irvin v. Dowd (1959) 359 U.S. 394, 3 L.Ed.2d 900, 79 S.Ct. 825, the court pointed out that state courts, equally with federal courts, have the obligation to guard, enforce and protect every right granted or secured by the Federal Constitution. In Lee v. State of Florida (1968) 392 U.S. 378, 20 L.Ed.2d 1166, 88 S.Ct. 2096, the court pointed to Article VI of the United States Constitution, as binding the state courts by the federal laws in the same manner as by the constitutional

provisions. Article VI includes:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;* * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * *and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;* * *

See also 42 U.S.C. Sections 1981-1988; Cooper v. Aaron (1958) 358 U.S. 1, 3 L.Ed. 2d 5, 78 S.Ct. 1401; O'Shea v. Littleton (1974) 38 L.Ed.2d 674, 687, 688, 94 S.Ct. 669.

It is clear, then, that in the fundamental principles laid down by the Lundy, Realty Executives, and Dutch Inns cases as above set forth, and by Goodman v. Newzona, that the appellate courts of Arizona are in harmony with recent as well as earlier land-mark decisions of the U.S. Supreme Court.

And it is equally clear that the superior court, being likewise bound by the federal constitution and laws, was without the power or jurisdiction in this instant case to enter its judgment altering the agreement of the parties, or to cover up by summary judgment, or by the failure to make requested findings and conclusions, the facts and documentary evidence presented. Where the lower court

has entered a judgment not within its jurisdiction, as here, the jurisdiction of the appellate court on review is limited to correcting the error of the lower court. Goodman v. Newzona Investment Co., supra; Lundy v. Prescott Valley, Inc., supra; Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965) 341 F.2d 514; Riley v. County of Cochise (1969) 10 Ariz. App. 55, 455 P.2d 1005.

In Preston v. Denkins (1963) 94 Ariz. 214, 383 P.2d 686, the court held that:

> The right to challenge a judgment on the ground that it is void for lack of jurisdiction of the parties does not depend upon rules of court or statute.
>
> Court has no discretion to refuse to vacate a judgment void for lack of jurisdiction and must vacate such a judgment.
>
> Order setting aside entire judgment as void does not leave judgment valid as against defendants not properly before court on the motion to vacate.

For further discussion of dismissal of appeals see Disposition of Civil Appeals In The Supreme Court--Dismissal. Charles C. Bernstein, 5 Arizona Law Review 175 (1964).

Accordingly, appellant is entitled to full consideration of the issues raised by his appeal, and therefore to a rehearing on the Order of February 24, 1975 dismissing the appeal and imposing sanctions.

Respectfully submitted this
11th day of March, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARZIONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 Department B MARICOPA County Superior Court No. C-222472 OBJECTIONS TO MOTION FOR REHEARING Filed: March 13, 1975

COME NOW the Appellees, James Stewart Co., M. Seth Horne, and Maurine D. Horne, pursuant to Rule 47(a) of the Rules of the Court of Appeals and file their objections to the Motion for Rehearing of Appellant, Francis M. Cocke, on the grounds that said Motion for Rehearing contains no new or substantial matters indicating that the Appeal taken by the Appellant was meritorious in any respect, as more fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted this 13th day of March, 1975.

KELLY & CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant's Motion for Rehearing, together with the Memorandum attached thereto, does not in any way support any basis for a reconsideration of this Court's dismissal of the Appeal and imposition of sanctions. Appellant, in his Memorandum of Issues Raised at page 4, lines 2 through 7, stated that the Order of September 30, 1974, from which Appellant allegedly bases his Appeal, "expressly ruled that Buyers' Judgment entered September 27, 1972 had modified the Agreement of the parties entered into on October 9, 1968, and also ruled that the escrow had been closed in accordance with such Agreement as so 'modified'."

Such a statement in itself shows that there is nothing per se in the Order of September 30, 1974 which Appellant is contesting in his Appeal. Instead, Appellant is attempting to use some wording found in this Order as a basis for reopening a Judgment entered some two years beforehand.

The entire substance of Appellant's Memorandum is aimed at the same arguments previously long ago resolved. While Appellant attempts to disguise these attacks through the use of different approaches to those arguments, it is clear that there is nothing of merit to support the Appeal.

The cases cited by the Appellant in his Memorandum add nothing, and are, in

fact, completely inapposite to the issue of whether a valid and meritorious Appeal was taken from the trial court's Order of September 30, 1974.

On the basis of the foregoing, it is respectfully requested that the Court deny Appellant's Motion for Rehearing.

DATED this 13th day of March, 1975.

KELLY & CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	No. 1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C 222472 RESPONSE TO MOTION FOR REHEARING
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	Filed: March 17, 1975

COMES NOW Transamerica Title Insurance Company of Arizona, by and through their undersigned counsel, and respectfully respond to appellant's motion for rehearing as follows:

As is usual, it is difficult to res-

pond to Mr. Cocke's Motion for Rehearing because of its shotgun nature. The motion is typical of other pleadings that have been filed herein which are at best, an attempt to rehash and relitigate matters that have already been determined in the case of Cocke v. Transamerica, 16 Ariz. App. 566, 494 P.2d 756 (1972), or have been previously decided in the first frivolous appeal that was filed by Mr. Cocke in his never ending quest of a cause of action against Transamerica.

A careful reading of the Motion for Rehearing leads to the conclusion that the appellant's request for rehearing is based primarily upon the fact that he has now filed his opening brief and that the judgments that were appealed from are either conditional or were entered without jurisdiction. As to the first contention, it is obvious that the mere filing of an opening brief after a Motion To Dismiss the appeal has been granted, does not in any way, bootstrap the appeal from the frivolous catagory in which it was founded. Secondly, the plain facts are that the judgments in favor of Transamerica which the appellant seeks to appeal, are final and were entered unconditionally, and at a time when the court had jurisdiction over Mr. Cocke, the property involved, and jurisdiction to determine the subject matter of the litigation.

In short, the Motion for Rehearing, is nothing more than another page in the long cronicle of harassment of Transamerica Title by the appellant. It is therefore respectfully submitted that the Motion for Rehearing should be denied and the Motion Dismissing the Appeal and Imposing Sanctions continued in full force and effect.

DATED this 17th day of March, 1975.

BROWDER & GILLENWATER, P.C.

By /s/ Powell B. Gillenwater

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona Corporation, et al., Appellees.	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 ORDER Filed: March 20, 1975

Appellant's motion for rehearing of this Court's order of February 24, 1975, dismissing this appeal as frivolous and for lack of jurisdiction, and the responses thereto, were considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating.

IT IS ORDERED denying the motion for rehearing.

DATED this 19th day of March, 1975.

By /s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

April 1, 1975

Filed: April 1, 1975

Mr. Clifford H. Ward, Clerk
Arizona Supreme Court
1700 West Washington Street
Second Floor, West Wing
Phoenix, Arizona 85007

Dear Mr. Ward:

RE: 1 CA-CIV 2970

MARICOPA C-222472

COCKE vs. JAMES STEWART
COMPANY, et al.

The appeal of this cause was dismissed by order of the Court on the 24th day of February, 1975.

The motion for rehearing was denied on the 20th day of March, 1975.

A timely petition for review was filed by this Court on the 31st day of March, 1975. Pursuant to the mandate contained in Supreme Court Rule 47(b), the record is hereby transmitted to your Court, as follows:

1. PETITION FOR REVIEW (7);
2. ORDER DENYING MOTION FOR RE-HEARING (6);
3. OBJECTIONS TO MOTION FOR RE-HEARING (6);
4. APPELLANT'S MOTION FOR REHEAR-ING ON ORDER ENTERED FEBRUARY

27, 1975 DISMISSING APPEAL AND IMPOSING SANCTIONS (6);
5. ORDER DISMISSING APPEAL (6);
6. ABSTRACT OF RECORD ON APPEAL (1-17 vols.) (originals);
7. APPELLANT'S OPENING BRIEF (orig, Sets 1 & 2);
8. Documents filed in the Court of Appeals, Division One (clipboard);
9. Instruments (4 parts);
10. Minute Entries;
11. Depositions (2 vols.) (ARLEIGH R. BURTON and M. SETH HORNE);
12. Exhibits (contained in one manila envelope and folder).

The copies of the abstract of record on appeal have been retained by the Court of Appeals, Division One, and are available upon request.

In the event the Supreme Court accepts the review, we will endeavor to secure and forward the remaining sets of abstracts of record and briefs.

Very truly yours,

CLASSIE GANTT, Clerk

By /s/ C. Walters
Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	12058 PR 1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 MOTION TO REMAND PETITION FOR REVIEW TO COURT OF APPEALS FOR PERMISSION TO ENLARGE THE RECORD AND TO FILE A PETITION FOR REHEARING

Filed:
April 21, 1975

COMES NOW appellant, Francis M. Cocke, by and through his attorneys undersigned and respectfully requests that this Court remand the petition for review now before this Court to the Court of Appeals for permission to enlarge the record to include depositions taken in the case but not now included in the record and for permission to file a petition for rehearing before the Court of Appeals for the reasons set forth in the Memorandum attached hereto and incorporated by reference herein.

Respectfully submitted this
21st day of April, 1975

SMITH, RIGGS, BUCKLEY, RIGGS
& FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
231 North Alma School Road
Mesa, Arizona 85201
Attorneys for Appellant

MEMORANDUM

Appellant's petition for review is now before this Court. Subsequent to the time appellant filed his petition for review with the Court of Appeals, that Court on April 1, 1975, directed a transmittal letter to Mr. Clifford H. Ward, Clerk of the Arizona Supreme Court pursuant to the mandate contained in the Supreme Court Rule 47 (b).

The letter set forth those items of the record transmitted to the Supreme Court.

Item 11 thereof specified that two depositions were transmitted, those of Arleigh R. Burton and M. Seth Horne.

Other depositions had been taken in the case and had been sent to the Superior Court of Maricopa County. These depositions should have been transferred to the Court of Appeals pursuant to appellant's designation of the record. However, it appears they were not.

The letter of April 1, 1975, was appellant's first notice that the other depositions were not contained in the record.

A close check with the Clerk of the Superior Court and the Clerk of the Court

of Appeals revealed the fact that the depositions were no where to be found and in fact the Superior Court had no record of receiving the depositions. However, copies of the depositions indicate that the originals were sent to the Superior Court.

Three of the depositions were prepared by Verona M. Polson & Associates, Court Reporting Services. These were the depositions of Henry Kavanuagh, Escrow Officer of Transamerica Title Insurance Company, taken February 27, 1970, at 10:10 o'clock, A.M., the deposition of Owen L. Wagoner, of Transamerica's Title Plant, taken February 27, 1970, at 11:45 o'clock A.M., and the deposition of Myron Howard, House Counsel for Transamerica, taken May 8, 1970, at 10:40 o'clock A.M.

Attached hereto and incorporated by reference herein is a statement from Marla F. Graham, daughter of Verona M. Polson and the new owner of Court Reporting Services attesting to the fact that the copies of the depositions of Henry Kavanuagh, Owen L. Wagoner and Myron Howard filed herein with these pleadings are true copies of the originals of same depositions excluding any handwriting on same.

Appellant's previous briefs referred to some of the material in these depositions. It is appellant's position that if said depositions had properly been in the record transmitted to the Court of Appeals that that Court may have ruled differently.

In addition there were two other depositions taken. One of Lorne McCarthy of Brown Engineering Co. Inc. and the

other of Francis M. Cocke. These latter two depositions it now appears were not filed with the Superior Court of Maricopa County.

Accordingly it is appellant's position that inasmuch as the full record was not before the Court of Appeals, that it would be proper at this time for the record before that Court to be enlarged so as to add the depositions and that it would be only proper that the appellant be allowed to file a motion for rehearing based on the enlarged record before that Court.

Respectfully requested,

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
231 North Alma School
Road
Mesa, Arizona 85201
Attorneys for Appellant

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	))12058 PR)1 CA-CIV 2970)DEPARTMENT B))MARICOPA County)Superior Court)No. C 222472))MEMORANDUM IN)OPPOSITION TO)MOTION TO REMAND)PETITION FOR RE-)VIEW TO COURT OF)APPEALS FOR)PERMISSION TO EN-)LARGE THE RECORD)AND TO FILE A)PETITION FOR)REHEARING)

Filed:
April 25, 1975

PRELIMINARY STATEMENT

This is a memorandum in opposition to appellant's motion to remand the petition for review to the Court of Appeals in order to enlarge the record at that level and to file a petition for rehearing. Appellant's motion was filed with the Court on or about April 21, 1975. In the memorandum attached to the motion it is set forth that certain depositions, which should have been included in the record on appeal, were not transmitted to the Court of Appeals by the Clerk of the Superior Court of Maricopa County. It is

appellant's position that if the depositions had been forwarded to the Court of Appeals that Court may have ruled differently than it did in the order issued by it February 24, 1975.

STATEMENT OF CASE

The chronological sequence of events necessary for consideration of the instant motion are as follows:

November 27, 1974--Notice of Appeal from eight orders and judgments filed by appellant.

January 30, 1975--Motion to Dismiss Appeal and impose sanctions filed by appellees Horne and Title Insurance Company of Minnesota.

February 24, 1975--Order of Division One of the Court of Appeals dismissing Appellant's appeal and imposing sanctions against the appellant Cocke.

March 11, 1975--Motion for Rehearing filed by appellant.

March 19, 1975--Order of Division One of the Court of Appeals denying appellant's motion for rehearing.

March 31, 1975--Appellant's Petition for Review by the Supreme Court of Arizona.

April 21, 1975--Appellant's Motion to Remand Petition for Review to Court of Appeals for Permission to Enlarge the Record and to File a Petition for Rehearing.

ARGUMENT

I APPELLANT'S MOTION IS NOT A PROPER MOTION

Appellees oppose the instant motion because it is not a proper motion. There is no provision for such a motion under the Rules of the Supreme Court of Arizona. Rule 47(a) provides that a party desiring a rehearing from a final order or decision of the Court of Appeals, except an order denying a motion for rehearing, may within fifteen days of such order or decision file a motion for rehearing. Quite clearly Rule 47(a) prohibits the filing of a motion for rehearing once such a motion has been filed and acted upon by the Court of Appeals.

Appellant filed a Motion for Rehearing on March 11, 1975, which was denied on March 19, 1975. To remand the case to the Court of Appeals at this point would allow appellant to file a second motion for rehearing in contradiction to Rule 47 (a).

Moreover, the motion is deficient in that there is absolutely no showing by appellant wherein the depositions which he claims to have been omitted from the record are material to the decision rendered by the Court of Appeals. True, the depositions may have been material to a substantive determination of the case. However, the Court of Appeals dismissal of appellant's appeal was based upon the fact that seven of the eight orders and judgments appealed from were "final, res judicata, and not subject to the subsequent, collateral attack" by appellant. As to the remaining order appealed from, the Court of Appeals quite properly pointed

out that no issue had been raised concerning that order which involved the account of the court appointed officer and the distribution which was to be made. Therefore, the Court of Appeals dismissed the case because appellant's appeal was untimely and frivolous.

II APPELLANT'S MOTION DOES NOT COMPLY WITH RULE 75(h), ARIZONA RULES OF CIVIL PROCEDURE

Obviously, the rules of the Court should be followed to the fullest extent. To this end appellees recognize that it might be possible to consider appellant's motion as "a proper suggestion" to correct the record within the meaning of Rule 75 (h), Arizona Rules of Civil Procedure. However, before that rule comes into play, the materality of the omitted material must be established. This appellant has failed to do.

Moreover, Rule 75(h) should not be invoked where the end result is to deny the appellees a substantive right. In this instance the appellees maintain that they have established their rights in the court below. Once before they have been put to the burden of pursuing an appeal in this case. Herein again they are being put to that burden; defending an appeal which they contend to be spurious, unmeritorous, frivolous and designed to harass and harangue them. Therefore, to allow appellant's motion to be considered under Rule 75(h) would in their opinion deny appellees a substantive right. Smith v. Wade, 245 Pac. 353 (1926); see also Rodriquez v. Williams, 451 P2d 609 (1969).

Moreover, it is the duty of the

Appellate Court to "interpret all parts of the record together, giving effect, if possible, to all and a deficiency in one place may be supplied by what appears in another," State v. Rockerfeller, 451 P2d 623 (1969). Therefore, assuming the materiality of the depositions in question, appellant has not shown if that defect in fact is corrected in some other part of the record.

In addition, appellant contends that if the depositions had been in the record transmitted, the Court of Appeals may have ruled differently. Inasmuch as the order of February 24, 1975 dismissing appellant's appeal was based on the grounds of frivolousness, it escapes appellees how the Court might have ruled differently if the depositions had been transmitted to it.

III APPLICATION OF RULE 4(e)

Rule 4(e) of the Rules of the Supreme Court provides that any motion not specifically provided for, if denied, will on the Court's motion subject the moving parties and their attorney to the assessment of costs and attorneys fees in an amount to be fixed by the Court in favor of the opposing parties. Appellees respectfully submit that appellant and his counsel have filed a motion not provided by the Court's rules. Appellant and his counsel have again taken a shot gun approach to perpetuate the delay in ending this litigation and to continue to harass appellees and burden the Court of this state with spurious and frivolous litigation. Accordingly, appellees maintain that the Supreme Court may in its discretion invoke the application of

Rule 4(e) to appellant's motion.

For the foregoing reasons, appellees maintain that appellant's motion should be denied.

DATED this 25th day of April, 1975.

Respectfully submitted,

By /s/ Roger K. Gilbert
Roger K. Gilbert for
Hubert E. Kelly
Attorney for Appellees
550 W. Washington
Phoenix, AZ

SUPREME COURT
STATE OF ARIZONA

April 30, 1975
Filed:
April 30, 1975

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona Corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona Corporation, Appellees.	Supreme Court No. 12048-PR Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472

The following action was taken by the Supreme Court of the State of Arizona on April 29, 1975 in regard to the above entitled cause:

"ORDERED: Motion to Remand Petition for Review to Court of Appeals for Permission to Enlarge the Record and to file a Petition for Rehearing = Granted."

Record returned to the Court of Appeals, Division One, including 3 volumes of depositions (Henry Kavanaugh, Owen L. Wagoner, and Myron Howard).

A copy of the Motion to Remand Petition for Review to Court of Appeals for Permission to Enlarge the Record and to File a Petition for Rehearing attached hereto.

CLIFFORD H. WARD, Clerk

By /s/ Mary Hopkins
Deputy Clerk

THE COURT OF APPEALS
STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARZIONA, an Arizona corporation, Appellees.	Supreme Court No. 12058-PR Court of Appeals No. 1 CA-CIV 2970 Maricopa County Superior Court No. C-222472 MOTION FOR PERMISSION TO ENLARGE THE RECORD AND PETITION FOR REHEARING Filed: May 9, 1975

COMES NOW Appellant, Francis M. Cocke by and through his attorneys undersigned and pursuant to the Order of the Supreme Court of the State of Arizona dated April 29, 1975, respectfully requests that this Court enlarge the record to include depositions taken in the case but not included in the record, and respectfully moves for a rehearing on this Court's Order of February 24, 1975, for the reasons set forth in the Memorandum attached hereto and incorporated by reference herein.

Respectfully submitted this 9th day of May, 1975.

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
231 North Alma School Road
Mesa, Arizona 85201
Attorneys for Appellant

MEMORANDUM

Now deposited with the Court of Appeals, Division 1, are three volumes of depositions, which volumes were not included in the record before this Court earlier received from the Maricopa County Superior Court. Accordingly these depositions were not before the Court at the time of the Court's Order on February 24, 1975, and perhaps at the times of its earlier decisions.

Appellant only discovered the absence of these depositions subsequent to the time that appellant filed his petition for review with the Court of Appeals, when this Court directed a transmittal letter to Mr. Clifford H. Ward, Clerk of the Arizona Supreme Court pursuant to Supreme Court Rule 47 (b).

The letter set forth those items of record transmitted to the Supreme Court, and item 11 thereof specified that only two depositions were transmitted, those of Arleigh R. Burton and M. Seth Horne.

Three other depositions had been taken in the case and had been sent to the Superior Court of Maricopa County. These depositions should have been transferred to the Court of Appeals pursuant to Appellant's designation of the record. However, it appears they were not.

A close check with the Clerk of the Superior Court and the Clerk of the Court

of Appeals revealed the fact that the depositions were nowhere to be found, and in fact the Superior Court now has found no record of receiving the depositions. However, copies of the depositions indicate that the originals were filed with the Superior Court. The three depositions were prepared by Verona M. Polson and Associates, Court Reporting Services. These were the depositions of Henry Kavanuagh, Escrow Officer of Transamerica Title Insurance Company, taken February 27, 1970, at 10:00 o'clock A.M., the deposition of Owen L. Wagoner, of Transamerica's Title Plant, taken February 27, 1970, at 11:45 o'clock A.M., and the deposition of Myron Howard, House Counsel for Transamerica, taken May 8, 1970, at 10:40 o'clock A.M.

Marla F. Graham, daughter of Verona M. Polson and new owner of Court Reporting Services has attested to the fact that the copies of the depositions of Henry Kavanuagh, Owen L. Wagoner and Myron Howard, now transferred to this Court, are true copies of the originals of the depositions excluding any handwriting on the depositions. A copy of her attestation was filed with the Supreme Court.

Appellant's previous briefs have referred to some of the material in these three depositions, and it is Appellant's position that if said depositions had properly been in the record transmitted to the Court of Appeals this Court may have ruled differently.

Accordingly it appears that it would be proper at this time for the record before this Court to be enlarged so as to include the depositions, and inasmuch as

the full record was not before the Court at the time of its Order on February 24, 1975, Appellant respectfully requests a rehearing based on the more complete record.

In the case of Lindus v. Northern Insurance Company of New York, 103 Ariz. 160, 438 P. 2d 311, at page 313 the Court stated:

> "We believe, however, that the proper criterion to be considered in determining whether to recall a mandate was succinctly expressed by the Supreme Court of the United States in United States v. Ohio Power Co., 353 U.S. 98, 99, 77 S.Ct. 652, 653, 1 L.Ed.2d 683, where it is stated:
>
> '* * * the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.'

Faced with the same problem that we now have before us the United States Supreme Court in Gondeck v. Pan American World Airways, Inc., 382 U.S. 25, 86 S.Ct. 153, 15 L.Ed.2d 21, in order to prevent injustice, granted a second petition for rehearing three years after the mandate had issued. See also Cahill v. New York, N. H. & H. R. Co., 351 U.S. 183, 76 S.Ct. 758, 100 L.Ed. 1075; Chapman v. St. Stephens Protestant Episcopal Church, 105 Fla. 683, 136 So. 238, 138 So. 630, 139 So. 188, 145 So. 757, 84 A.L.R. 566.

A decision to recall a mandate must

> of necessity include a balancing of competing interests. Where the interests of justice outweigh the interest in bringing litigation to an end the court should recall the mandate. Of course where there has been either fraud, imposition, or mistake of fact, the court can always recall a mandate to modify or correct its own judgment. Overson v. Martin, 90 Ariz. 151, 367 P.2d 203."

In addition to the three depositions above mentioned, there were two other depositions taken in this case. One of Lorne McCarthy of Brown Engineering Co., Inc. and the other of Francis M. Cocke. It now appears that these later two depositions were not filed with the Superior Court of Maricopa County. However, if the Court so desires, these two depositions could also be made a part of the record.

Respectfully submitted,

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.

L. Alton Riggs, Jr.
231 North Alma School Road
Mesa, Arizona 85201
Attorneys for Appellant

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona Corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN A COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona Corporation, Appellees.	)	1 CA-CIV 2970 DEPARTMENT B MARICOPA Co. Superior Court No. C-222472 ORDER Filed: May 16, 1975

Pursuant to the order of the Supreme Court of the State of Arizona dated April 29, 1975, appellant's motion for permission to enlarge the record and petition for rehearing were considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating.

IT IS HEREBY ORDERED granting appellant's motion to enlarge the record.

IT IS FURTHER ORDERED denying appellant's petition for rehearing.

DATED this 16th day of May, 1975.

By /s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

May 22, 1975
Filed:
May 22, 1975

Mr. Clifford H. Ward, Clerk
Arizona Supreme Court
1700 West Washington Street
Second Floor, West Wing
Phoenix, Arizona 85007

Dear Mr. Ward:

RE: 1 CA-CIV 2970

MARICOPA C-222472

SUPREME COURT NO.
12058-PR

COCKE vs. JAMES
STEWART COMPANY, et al.

The appeal of this cause was dismissed by order of the Court on the 24th day of February, 1975. Thereafter, a petition for review was filed on March 31, 1975.

Thereafter, and on the 21st day of April, 1975, the Arizona Supreme Court remanded this appeal to the Court of Appeals, Division One, for a limited purpose "SUPREME COURT NO. 12058-PR".

On May 16, 1975 the Court of Appeals, Division One, granted the appellant's motion to enlarge the record, and denied appellant's petition for rehearing.

A timely petition for review was filed in this Court on the 21st day of May, 1975. Pursuant to the mandate contained in Supreme Court Rule 47 (b), the record is hereby transmitted to your Court, as follows:

1. ORDER (filed May 16, 1975) (6);
2. MOTION FOR PERMISSION TO ENLARGE THE RECORD AND PETITION FOR REHEARING (6);
3. PETITION FOR REVIEW (7);
4. ORDER denying motion for rehearing (orig);
5. OBJECTIONS TO MOTION FOR RE-HEARING (orig);
6. APPELLANT'S MOTION FOR REHEARING ON ORDER ENTERED FEBRUARY 24, 1975 DISMISSING APPEAL AND IMPOSING SANCTIONS (orig);
7. ORDER DISMISSING APPEAL (orig);
8. ABSTRACT OF RECORD ON APPEAL (1-17 vols.) (originals) (boxed);
9. APPELLANT'S OPENING BRIEF (orig, Sets 1 & 2)
10. Documents filed in the Court of Appeals, Division One (clipboard)
11. Instruments (4 parts) (boxed);
12. Minute Entries (boxed);
13. Depositions (5 vols) (ARLEIGH R. BURTON: HENRY KANANUAGH, OWEN L. WAGONER, M. SETH HORNE and MYRON HOWARD):
14. Exhibits (contained in one manila envelope and folder).

The copies of the abstract of record on appeal have been retained by the Court of Appeals, Division One, and are available upon request.

In the event the Supreme Court accepts the review, we will endeavor to secure and forward the remainder of the file.

Very truly yours,

CLASSIE GANTT, Clerk

By /s/ C. Walters
Deputy Clerk

SUPREME COURT
STATE OF ARIZONA

June 18, 1975
Filed:
June 18, 1975

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	Supreme Court No. 12058-PR-2 Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472

The following action was taken by the Supreme Court of the State of Arizona on June 17, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review = Denied."

Vice Chief Justice Fred C. Struckmeyer, Jr. voting to grant.

Record returned to the Court of Appeals, Division One, this 18th day of June, 1975.

CLIFFORD H. WARD, Clerk
BY /s/ Mary A. Hopkins,
Deputy Clerk

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., and Arizona corporation, et ux, et al, Appellees.	No. 12058-PR-2 Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472 NOTICE OF SUBSTITUTION OF COUNSEL

NOTICE IS HEREBY GIVEN that RICHARD L. THOMPSON is substituted in place of L. ALTON RIGGS, JR., for the appellant herein.

DATED this 3rd day of July, 1975.

/s/ Francis M. Cocke
FRANCIS M. COCKE,
Appellant

/s/ R. Thompson
RICHARD L. THOMPSON, Atty.
for Appellant
132 South Central Avenue
Suite 7
Phoenix, Arizona 85004

IN THE SUPREME COURT
STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; et ux, et al., Appellees.	NO. 12058-PR-2 Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472 MOTION FOR REHEARING AND MEMORANDUM

Filed: July 3, 1975

Appellant, by counsel, moves the court for a rehearing on its order of June 18, 1975, denying review; the Honorable Fred C. Struckmeyer, Jr., voting to grant; for the reasons set forth in the memorandum attached hereto.

RESPECTFULLY SUBMITTED this 3rd day of July, 1975.

/s/ Richard L. Thompson
Richard L. Thompson
Attorney for Appellant
132 South Central Avenue
Suite 7
Phoenix, Arizona 85004
254-7331

FACTS

The underlying cause was one for specific performance of a contract for the sale of realty and for damages. Defendant/ Appellant urgued and proved throughout the

life of the cause (athough, admittedly, not always succinctly) that he had performed all duties imposed on him by the original contract and that the specific relief prayed for could not be granted against him since another party to the contract, the escrow agent, was the one refusing to act. Nonetheless, the trial court modified the contract and awarded judgment of specific performance ordering the defendant to do that which could only be done by the escrow agent.

The court, in setting out to effect the relief that it could not grant since the balking escrow agent had not been a party defendant to the buyers' complaint, ordered the substitution of another escrow agent as an officer of the court and then caused the substitute agent to act.

A considerable number of motions, appeals, orders and amendments preceeded and followed in the cause. On or about January, 1974, Defendant brought a civil action arising out of these proceedings, in Federal Court and named the Honorable Eino M. Jacobson as one of the defendants, a Petition for Certiorari to the United States Supreme Court was allowed to be docketed in that cause on June 6, 1975.

The trial court judgments became final and appealable on the 30th day of September, 1974, and the defendant took issue with all orders and judgments, conditional, interlocutory and otherwise, entered therein and timely filed notice of appeal.

Prior to the time for filing the opening brief and based on the record and moving papers, the court summarily dismissed the appeal concluding that no substantial

issues were raised, the issues were precluded, the issues were frivolous and the appeal was brought for the purpose of delay.

In dismissing, the court awarded money damages to the appellees in the aggregate amount of $5,753.

THE DISMISSAL

The Order of the Court of Appeals summarily finds the most significant questions attempted to be raised by the appeal and, in doing so, by fiat overrules this court's holding in Stevens v. Mehagian, 90 Ariz. 43, 365 P2d 208 and holds contrary to the overwhelming majority opinion concerning conditional or interlocutory judgments. That is, the basic principle presented, or to have been presented to the appellate court concerned the question of finality of those interim orders and judgments entered in this multi-party suit. The court summarily decided that very issue by ruling that the mere attempt to litigate that question whether prior orders and judgments within the multi-party action were or were not "final" and "appealable" - was itself a display of frivolity and without substance, subject to sanctions.

The summary finding, prior to the filing of an opening brief and based only on the record, the notice of appeal and moving papers denies the appellant the right to appeal, denies the citizens of Arizona authority for determining when and what to appeal from, and reverses this court while foreclosing the raising of the fundamental question ever again under fear of sanction.

THE SANCTIONS

Appellant was sanctioned for having attempted to appeal from that which can, more than merely arguably, be presented as gross error in the trial court and a perversion of long standing lawful principles.

Assuming, if you will, that the judgment for specific performance entered by the trial court on September 27, 1972, and conditioned on the future performance of certain acts by both plaintiff and defendant, was a "conditional judgment"; then, the judgment was not appealable at the time it was entered and all orders and amendments subsequent and ancillary thereto would "automatically be considered on appeal from the final order or judgment itself." Order, Court of Appeals, 24 February, 1975, at Page 2.

The mere attempt of appellant to appeal from a "conditional judgment" and orders and amendments ancillary thereto resulted in the claim of "frivolity", a declaration of frivolity and the conclusion that the appeal was solely for the purpose of delay.

Indeed, appellant's land had been conveyed, appellant had been convicted of criminal trespass without having been ousted, appellant's proceeds from the sale and interest on the purchase approximately $80.00 per day, had been denied for over four years and the court finally, on September 30, 1974, found that the buyer had complied with the "court modified" contract - it is difficult to imagine benefit to the appellant by delay.

As previously admitted, appellant's pleadings, motions and procedures were not always succinct and surely can be characterized as "prolix" but nonetheless, if openly reviewed, merely establish his zeal and frustration in good faith attempts to appeal from fundamental error (the trial court's "modifying" a contract, severence of clauses of a contract, ordering specific performance by appellant of duties which, under the agreement, could only be performed by the escrow agent). The appellant's effort to timely appeal from conditional or interlocutory judgments, when they became appealable cannot reasonably lead to the appellate court's finding the appeal to have been, "taken solely for delay and frivolous and an abuse of the appellate process" (Order, 24 Feb. 1975 at p.2) and result in sanctions.

THE TRIBUNAL

As previously stated, appellant filed a civil action in the U.S. District Court, District of Arizona, CIV 74-20. The Honorable Eino M. Jacobson, in his individual capacity and not official capacity, was named as one of the defendants. The subject matter of the complaint arose directly out of the action herein, specifically, the real estate transaction and subsequent state court litigation.

The appellant filed the notice of appeal herein subsequent to bringing the Federal Court action.

At the time of filing of the notice of appeal herein there were three departments in the Division One of the Court of Appeals.

The order summarily dismissing the appeal and awarding sanctions was issued on February 24, 1975, by Department B, the Honorable Eino M. Jacobson presiding.

On June 6, 1975, a Petition for Certiorari to the United States Supreme Court was docketed in Cause CIV 74-20.

Without inferring or even attempting to infer that the court was wrongfully influenced by the pending civil action, it is respectfully submitted that the Supreme Court has held:

> ". . . a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . every procedure which would offer a possible temptation to the average man as a judge . . . denied . . . due process."
> In the Matter of Lee Roy Murchison and John White, 349 US 133, 99 L.Ed. 942, 75 S.Ct. 623 (1954).

Appellant, by counsel, respectfully requests the Court to grant review herein.

RESPECTFULLY SUBMITTED this 3rd day of July, 1975.

/s/ Richard L. Thompson
Richard L. Thompson
Attorney for Petitioner
132 S. Central Ave., Suite 7
Phoenix, Arizona 85004